Brief of Appellants

United States Court of Appeals

for the Ninth Circuit

No. 14782

GLENN WOODBURY and
PEARL WOODBURY,

Appellants,

vs.

ALFRED CLERMONT and
MARGUERITE I. CLERMONT,

Appellees.

Upon Appeal from the District Court of the United States for the District of Montana

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STATEMENT OF QUESTIONS PRESENTED

A. Can the appellees rely upon the ambiguity, (of "mortgage" or "contract for deed"), in the earnest money receipt which constituted the agreement between the appellees and the appellants to excuse their non-performance.

B. Does the existence of the lien of the Bitter Root Irrigation District justify the appellees in not going forward with the deal and paying the $11,000.00 when the lien itself was much less than the $11,000.00 payment?

C. Is this a proper case for relief from forfeiture under Section 17-102, Revised Codes of Montana, 1947?

D. Even assuming appellants are liable, can they be ordered to pay back $5,000.00, or $1,000.00 more than they received from the appellees?

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I. STATEMENT OF THE CASE

In this case the appellees are seeking to have returned to them by the appellants a $5,000.00 down payment made under an earnest money receipt for the sale of real property in Montana. The Judge of the United States District Court for the District of Montana gave judgment (Tr. 38) against the appellants on the basis of finding of fact (Tr. 31) in which the lower court held that the appellants did not live up to the terms of the earnest money receipt which is appellees' Exhibit No. 3, in that the appellants were unable to give in timely manner merchantable title because of (a) a lien in favor of the United States arising out of a contract with the Bitter Root Irrigation District, and (b) legal title to the property, as opposed to equitable title, being vested in Bernhard Jannsen and Anna Jannsen because of which the abstract of title did not show title to be in the appellants.

In addition to the finding of title defects the lower court found that the appellees acted promptly and in good faith and were not guilty of any wilful breach of duty such as would prevent them from having a return of their down payment (Tr. 36 and 37).

In writing this brief we shall take the facts from the evidence offered by the appellees themselves and from the uncontroverted evidence offered by the appellants. The appellees' Exhibit No. 3 (Tr. 260), an earnest money receipt, is an arrangement whereby the appellants Woodbury sold to the appellees Clermont a ranch in the Bitter Root

Valley in Montana for a total purchase price of $36,000.00, of which the Woodburys were to receive Sixteen Thousand Dollars ($16,000.00), and the balance was to be paid to Bernhard Jannsen and the Federal Land Bank. Five Thousand Dollars ($5,000.00) was paid on the date of the agreement, and Eleven Thousand Dollars ($11,000.00), the balance Woodbury was to receive was to be paid on June 15, 1953. The remainder was to be paid as provided in the instruments containing the terms of the agreement between the Woodburys and Jannsen, and between the Woodburys and the Federal Land Bank. Pearl Woodbury, whose testimony is uncontroverted on the point, said that about two weeks after the deal was made the Clermonts came to their home near Stevensville, Montana, to ask for their $5,000.00 down payment back, stating on page 215 of the transcript:

> "Q. Was there any discussion about the sale?
>
> A. That is the day he wanted to know if I thought my husband would give him his money back."

To the same effect is the testimony of her husband, Glenn Woodbury, he being uncontradicted in his statement on page 95 of the transcript:

> "Q. Did you have any conversation with Mrs. Clermont relative to this deal you made?
>
> A. Only that she made the remark they might have made a mistake buying it, but she told her husband that she thought if they decided they

didn't want it, Mr. Hagarty could resell it for them."

Marguerite I. Clermont herself testified on page 193 of the transcript:

> "A. . . . we even asked them *if they would be willing to return us all of our money or part of it,* and wait to be sure we had money, as we had received word recently, a few days later, from the Wheat Board stating that it was impossible for them to guarantee delivery of that wheat by the end of May, as they had given us reason to believe before." (Emphasis ours).

It is significant that this was before any abstract whatsoever was delivered. The appellees' Exhibit No. 2 (Tr. 52) constitutes a demand for the abstract and title and is dated June 11, 1953. The earnest money receipt is silent as to when the abstract was to be delivered, the demand for the abstract thus coming after the appellees had sought the return of their money.

Glenn Woodbury testified without contradiction that he got the abstract and took it to the attorney mentioned in the letter of June 11th, to whom the appellant, Glenn Woodbury, was to deliver the same and that he further says (Tr. 104 and Tr. 105):

> "A. . . . I told him that there was a matter of about $11,000 payment that was due that day, and he informed me they weren't going to pay me $11,000 or any more money on that contract until

> they had a chance to examine the abstract. I agreed with him that that was quite all right with me, I didn't expect him to give me any money, but I asked him if he thought it was any more than right that he have the money in his possession when he examined the abstract inasmuch as the payment was due that day, so if the abstract was not right and I was out an expense to make the abstract right, that I had no assurance that the deal was going to be completed."

At the time of delivering the abstract to the appellees' attorney Mr. Woodbury makes the uncontradicted statement as to what took place (Tr. 106):

> "A. I just told him I didn't want the money myself, I wanted him to have the money and hold it and if the abstract was okay, deliver it to me, and if it wasn't, *I would make the abstract good, whatever it took, and when I made it good, I wanted the money to be there as an assurance . . .*" (Emphasis ours).

Woodbury further states that he is willing still to go through with the transaction and that he still owns the property and is willing to apply the $5,000.00 down payment in dispute on the purchase price (Tr. 108), and willing to pay off the asserted title defects.

It is to be noted that the appellees' Exhibit 3, being the earnest money receipt, provided that "the real property is

to be conveyed by contract for deed . . ." the words "contract for deed" are written in in ink.

It is the appellees' contention that in this $36,000.00 sale the contract for deed applied to a mere $200.00 differential which under one construction of the contract might have been due to the Woodburys in addition to the $16,000.00 equity that they have in the property (Tr. 82 and Tr. 83). It is the appellants' contention that this phrase in the contract for deed meant simply that the Woodburys were to assign and give over to the Clermonts the contract for deed which they had with Jannsens, notwithstanding that the Jannsen arrangement is referred to as a mortgage in other portions and parts of the appellees' Exhibit 3. Parol evidence was admitted to shed light on this ambiguity and the appellee Marguerite Clermont testifies herself on page 192 of the transcript that she knew that Jannsen had a deed to the property and not Woodbury, she stating in these words:

"Q. Who was going to have the deed to the property?

A. *We figured it would be Mr. Jannsen."*
(Emphasis ours).

Alfred Clermont himself refers to this Woodbury-Jannsen arrangement as an agreement, using these words and answers on page 207 of the transcript:

"Q. (By Mr. Erickson): Mr. Clermont, did Mr. Hagarty discuss with you at the (221) first

time you met the terms of the agreement between Jannsen and Woodbury?

A. Well, yes, the terms to pay this—

Q. Jannsen?

A. $1,000 a year.

Q. And did he say what the interest was?

A. At three percent."

The $11,000 payment which was due June 15th and never paid was to come from the proceeds of the sale of Canadian wheat belonging to the appellees, and the simple fact of the matter is that this money was not received until July 29th under the testimony of the appellee Marguerite Clermont on page 200 of the transcript.

It is to be noted that the $5,000.00 down payment in dispute was not made entirely to the appellants but this payment was made in two checks, $1,000.00 to the real estate agent, Pat Hagarty, who is not a party to this suit (Tr. 66).

II. ASSIGNMENTS OF ERROR

1. The Court erred in refusing to dismiss the complaint for failure to state a claim upon which relief can be granted;

2. The Court erred in entering judgment for the appellees;

3. The Court erred in refusing to dismiss the complaint for the reason that neither by the complaint nor the reply

did the appellees allege themselves to be ready, willing and able to perform under their contract nor did they allege tender;

4. The Court erred in entering judgment for the appellees for the reasons that:

(1) Appellees did not prove they were ready, willing or able to perform under the contract, nor did they prove tender;

(2) The appellees were in default under their contract and appellants were not since appellants could only be placed in default by tender on the part of the appellees or an offer to perform;

(3) Appellants were not required to show marketable title until there had been tender of performance by the appellees;

(4) The Court, in making its findings of fact disregarded (281) the parol evidence explaining the imperfections and ambiguities in the contract;

(5) The appellants were only required to have good title at the time set for conveyance of the lands involved;

(6) The testimony shows without question that the appellees knew, understood and agreed that the Jannsen contract was a contract for deed and

not a mortgage, and they expressly agreed to assume the contract;

(7) The appellees were fully informed and were put on notice of the existence of the lien for irrigation charges. If they were not, under the terms of the contract, their lien of the irrigation construction charges could have been paid out of the purchase money;

(8) The evidence established that appellants had suffered damage by reason of the failure of the appellees to carry out their contract in excess of the down payment.

III. ARGUMENT AND AUTHORITIES

It is the contention of the appellants that a negative answer must be given to all of the above four questions and particularly that the appellees cannot rely upon their claimed right to buy the property subject to a mortgage instead of taking an assignment of a contract for deed where they bought the property without knowing but what the terms of the contract for deed were more favorable in every respect than a mortgage. And the lien of the Bitter Root Irrigation District being approximately $4,500.00 and less than the amount of the next payment due, $11,000.00, could have been paid by the appellees themselves under the express terms of the contract. And that by reason of these facts it is not a proper case for a relief from for-

feiture, but instead is a case of wilful attempt to evade the contract.

A. Ambiguity of "mortgage" or "contract for deed" does not excuse non-performance.

As we see it and as we will point out, it is clear, on the face of the earnest money contract the Clermonts were buying Woodbury's equity and assuming the obligations under the Jannsen contract for deed and the Federal Land Bank mortgage. The contract sets out the terms of the Jannsen contract. The Clermonts agreed to make the annual payments and interest provided in that contract, they were offered an opportunity to examine it, and *Mrs. Clermont on the stand said that she understood that after they had paid off the Woodburys, the legal title would be in Jannsen,* showing that she was under no misapprehension as to legal effect of the contract between Woodbury and Jannsen. And while it is true that in other portions of their testimony this appellee insisted strongly that the Jannsen-Woodbury arrangement was promised to them as a mortgage, still it is true that she does admit that she knew Jannsen was to have title after Woodburys' equity was brought out by herself and her husband. Where a party's testimony contains conflict, he is not entitled to judgment unless the portion least favorable to him authorizes the judgment.

Thus, in the case of *Morton v. Mooney, 33 Pac. (2d) 262, 97 Mont. 1,* this court held on pages 12 and 13:

". . . 'if a person testify in his own behalf, and there are material conflicts and contradictions in his testimony, he is not entitled to recover if he be the plaintiff, unless that portion of his testimony which is least favorable to his contention is of such a character as to authorize a recovery in his behalf'. While plaintiff's testimony contains statements which may be said to render his version of the accident more credible than certain of those quoted above, under the last-quoted rule, those statements are to be disregarded. 'It cannot be unfair to this plaintiff to deal with his case from the standpoint of his own statements'."

In the case of *Putnam v. Putnam, 282 Pac. 833, 86 Mont. 135*, the court held on page 143:

" 'It cannot be unfair to this plaintiff to deal with his case from the standpoint of his own statements' . . . 'If a person testify in his own behalf, and there are material conflicts and contradictions in his testimony, he is not entitled to recover if he be the plaintiff, unless that portion of his testimony which is least favorable to his contention is of such a character as to authorize a recovery in his behalf'." (Emphasis ours).

B. The existence of lien of irrigation district does not excuse non-performance.

One of the objections of the purchaser to the marketability of the title was the lien of the irrigation construction charges. A witness testified that the lien of these charges secures an obligation of approximately $4,500.00 (Tr. 48). There is testimony that the purchasers inquired

at length about the source of the irrigation water. The witnesses agree that the purchasers were told what the annual water charge would be. There is nothing to remotely suggest in this record or in the conduct of the sellers as revealed by the record, any intent on the part of the sellers to conceal any material facts from these purchasers. They offered to show the purchasers the Jannsen contract and they told the purchasers where to get full information on the water charges.

Appellants have pleaded waiver on the part of the buyers of a right to object to the marketability of the title on the title on the basis of the lien of the irrigation charge, by their express agreement to assume the water payments. We submit that the facts bring this case within the authority cited in *57 A.L.R. 1396.*

While there was no reference to the lien of the irrigation charges as such, there was an agreement to pay the water charges, beginning with the year 1953. *The payment of the water charges would, of course, operate eventually to discharge the lien.* The testimony, which was not controverted, is that Clermont asked if eventually part of the water charge would be paid off (Tr. 87). He was told in reply that Woodbury understood that sometime the debt would be paid off on the water, but he couldn't say whether it would be in his lifetime or Clermont's (Tr. 87).

But, if the Court should determine that under all of the facts, the buyers may say that the lien of the irrigation

construction charges is a defect in the title rendering it unmarketable, their remedy is set out in Paragraph III of the contract, which is appellees' exhibit number three, the applicable language being:

> "Encumbrances to be discharged by a seller, may at his option be paid out of the purchase money at the date of closing."

It is pretty hard to tell from this agreement what the date of closing is, but it apparently would be the date on which the contract for deed provided for in Paragraph 2 is assigned. It may be assumed that it was contemplated that the contract for deed be assigned on or before June 15, the date upon which the balance that Woodbury himself would receive of Eleven Thousand Dollars ($11,000.00) was paid. That balance of Eleven Thousand Dollars ($11,000.00) exceeds the amount of the irrigation construction lien. The buyer, therefore, had full power to discharge the lien by payment of it out of the balance of Eleven Thousand Dollars ($11,000.00) due.

Under Paragraph 4, it is obvious that the provision as to merchantability is not an arbitrary provision, for the seller is given an opportunity to make it merchantable within a reasonable time. The buyers here have the ability to see that the irrigation construction lien is discharged out of the Eleven Thousand Dollars ($11,000.00) owing Woodbury, and they may not nullify the contract which they entered into with the sellers, both sides acting in good

faith, by setting up this lien, as it is said by the Montana Court in the case of *Clifton v. Willson, 47 Mont. 305, 132 Pac. 424:*

> "It is the policy of the law to compel parties to live up to their agreements and not encourage them in their violation."

In the case of *Witherow v. Witherow, 16 Ohio 238,* the Court, in discussing a case similar to the Clifton case and speaking of the requirement of pleadings and proof to avoid forfeiture, said:

> "It is the duty of Courts to enforce the performance of contract, not to encourage their violation."

Since the method for the discharge of any existing encumbrance is set out in specific language in the contract, and since the amount remaining unpaid is sufficient to discharge the obligation, we sincerely believe a holding that the lien of the construction charge, (if the Court holds that is a defect in the title under this agreement), is sufficient to relieve the buyers of their obligations under the contract would be contrary to the principle stated above that it is the duty of the Court to enforce the performance of a contract and not to encourage its violation.

The rule is stated in *55 Am. Jur. Pru. 685,* that:

> ". . . the existence of an encumbrance which may be removed or discharged by application of the purchase money, is not considered such a defect as to render the title unmarketable, and excuse the pur-

> chaser from the performance of his contract. If an encumbrance can be removed by the application of the purchase money so that a clear title can be conveyed to the vendee, the mere facts that the vendor has not removed it or is unable to remove it without the application of the purchase money, will not excuse the vendee."

In *3 American Law of Property 135,* a work published in 1952 and a standard text in the subject, the author says unpaid liens of various sorts specified:

> ". . . will render the title defective unless the lien may be paid off by means of the unpaid purchase price money."

A case quite similar to the one before the Court is *Sparks v. Helmer, Okla. 286 Pac. 306.* The contract there:

> "Provided that defendants were to furnish an abstract of title showing marketable title, the same to be approved by an attorney selected by the plaintiff."

In holding that the buyer could not relieve himself of his obligation under the contract to buy by reason of the existence of an encumbrance in an amount which would permit its discharge by application of a part of the purchase price, the Court said:

> "It is argued by plaintiff that defendants breached the contract by failing to pay off and discharge the mortgages held by the mortgage company. On this proposition the evidence is conclusive that the defendants were willing to permit a part of the purchase

price to be used to take up these mortgages. It also appears that arrangements could readily have been made to procure the releases in this manner. The purchase price of the land under the contract was in excess of the amount due on these mortgages. Plaintiff could in no wise been injured by permitting this to be done. The trial court held this a substantial compliance with the contract on the part of defendants. With this holding we agree."

In this case there is specific provision in the agreement permitting the discharge of the lien out of moneys owing on the closing date. This provision was in existence at the time the buyers made their objection to the title.

We respectfully submit that if the right to object to the lien of the construction charges was not waived by the buyers, the Clermonts, they are limited to the relief provided in the contract. They may not either rescind the contract or procure the return of the earnest money under the First Count, so long as the balance owing Woodbury exceeded the amount required to discharge the lien.

C. Appellants need not have made their title marketable until the $11,000.00 payment was made.

The rule is that where the vendor agrees to furnish a marketable title in the absence of an express stipulation to the contrary, he need only have marketable title at the date of the conveyance of the property. Counsel for appellees in their brief to the lower court have said the provision, in this Receipt and Agreement to Sell and Purchase,

that the conveyance to the Clermonts is to be by contract for deed is nonsensical, but there is no dispute in the testimony that the agreement between the Woodburys and the Clermonts was to be finalized through the ordinary contract for deed. In the case of a contract for deed, their obligation to furnish a marketable title would be satisfied if the seller had such a marketable title on the date the actual conveyance by deed was made to the buyers. For example, it is stated in 57 *A.L.R. 1514:*

> ". . . it has been held that in the absence of stipulations to the contrary, the contract to convey land has reference to the condition of the title at the time fixed for the execution of the deed and not at the time of the execution of the contract . . ."

The rule is also stated in *55 Am. Pru. 717:*

> "The general rule is that although the title of one who enters into an executory contract for the conveyance of land may be defective at the time he enters into such contract, if the vendor is able to convey a good title when the time for the conveyance of the land arrives, it is sufficient."

The rule aplies even where the vendor has merely the equitable title. 55 *Am. Jur. 724:*

The question is exhaustively annotated in *109 A.L.R. 242,* where the rule is stated at 251:

> "The circumstances that the vendor is only the equitable owner of the premises contracted for does not, prior to the time set for conveyance, entitle the vendee to rescind or suspend payments."

There is language, certainly, in the agreement that indicates that the vendors must have marketable title prior to the time for the actual conveyance, or at a time earlier than the time for actual conveyance. There is an inference that the abstract be furnished prior to the time the Clermonts did anything further in the way of paying for the property, but we respectfully submit the inference to be not a strong one and we respectfully submit there are other inferences to be drawn from the language of the contract which support the position taken by Woodbury that the title did not have to be marketable until the time for actual conveyance, or when the $11,000.00 would have been paid.

For example, Paragraph I fixes no time for delivery of the abstract. It says the abstract shall be continued "to a date subsequent hereto." Nothing is said as to time of delivery, particularly with relation to the making of the second payment. As in the authorities cited above, the real question in every case insofar as the purchaser is concerned, is whether, when he completes his payments, he will have good title, and that is the reason that under the ordinary rules, the obligation of the seller is satisfied if he can provide a merchantable title at the time of the conveyance.

The testimony here is uncontroverted that the Clermonts were not to get the deed to the property until the Jannsen obligation was paid off. Mrs. Clermont clearly understood

this from her own testimony. As pointed out above, she said on the stand that after paying off Woodburys, the title would be in Jannsen (Tr. 192). Under this contract and agreement, the Clermonts assumed to pay the Jannsen obligation and obviously on the date of the actual conveyance the Jannsen obligation, no matter what its form, could not be a title defect.

The primary object of the agreement is contained in Paragraph II. What the purchaser sought and what the sellers agreed to give eventually was a conveyance free and clear of all encumbrances, with the exceptions noted in Paragraph II. The buyers here have seized on the abstract feature of the agreement in an attempt to relieve themselve of their obligations under the contract. The title that was furnished, so far as the Jannsen obligation is concerned, complied with the purpose of the contract. The irrigation charge will be discussed later. We respectfully submit that in the light of Paragraph No. II of the contract, the failure to set a date for the delivery of the abstract and the general purposes of the contract, the ordinary rule applies, and that is that there was no obligation on the part of the seller to furnish proof of marketable title until the time came for the actual conveyance.

There is no showing that the seller could not have given good title when the time for conveyance of the actual title came. Woodbury testified directly that even as to the irri-

gation lien, he could discharge it prior to the time of conveyance.

D. The appellees were never ready, willing and able to perform.

The appellees were in a position of having regretted their bargain and wilfully set out to defeat it.

Prior to June 15, the appellees had repeatedly told the appellants that they were not able to pay the Eleven Thousand Dollars ($11,000.00) due on June 15. On the stand, the appellee, Marguerite I. Clermont, stated that they could have borrowed enough money to make the payment on June 15, but at the same time, she stated, as did her husband, that they had never, in any manner, indicated to the defendants that they were ready, willing or able to perform had they been satisfied with the abstract.

There is no allegation in either the complaint or the reply that the appellees were either ready, willing or able to perform, or any allegation of a tender on their part. The court now has before it not only the pleadings which fail to allege tender or ability to perform on the part of the appellees, but also affirmative proof that there was no tender nor was there anything said or done to indicate to the appellants that the appellees would perform if the abstract proved satisfactory, or if defects, if any, were cured.

With the testimony, as well as the pleadings before the Court, we respectfully submit that the appellees have no

standing before the Court. If we grant that the furnishing of an abstract, showing marketable title was due on or before June 15, 1953, there still is no question but that by express unequivocal language of the receipt and agreement to sell, the appellees were required to be ready, willing and able to perform on June 15, 1953. Under the most favorable view to the plaintiff and under every decision that we have been able to find, tender or an offer to perform was an obligation that came into existence on June 15, 1953, on the part of the appellees. The appellees may not put the appellants in default until the tender or offer to perform is made. As will be pointed out later, the instrument entitled Receipt and Agreement to Sell and Purchase is an incomplete document obviously intended only as a binder, and in many respects, ambiguous, however the date that the balance was to be paid to Woodbury is clearly and unequivocally fixed as June 15, 1953.

The provision for the furnishing of the abstract showing marketable title is for the benefit of the appellees, and there is no obligation on the part of the appellants to furnish any abstract until demanded by the appellees. Before any obligation devolved upon the appellants under Paragraph No. 4, there had to be a written notice on the part of the appellees containing a statement of defects. This notice was not furnished until after the 15th day of June, the notice being "Exhibit B" and bearing date June 22, 1953.

We believe, at the very least, that tender, or at least an allegation of an ability and willingness to perform on June 15 is essential before the appellants can be put in default. We again urge that *Section 58-209, Revised Codes of Montana, 1947,* in the light of the pleadings and evidence applies:

> "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able to fulfill and offer all conditions concurrent so imposed upon him on the like fulfillment by the other parties except as provided by the next section."

The next section referred to is *Section 58-210* which excuses performance only where one party to an obligation gives notice to another before the latter is in default, that he will not perform the same upon his part, the section reading in full:

> "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former."

In addition to the general rules stated in our brief on the motion to dismiss, the Court' attention is called to the rule

as it is stated in *1 Bancroft's Practice and Remedies 351.* the author there says:

> "In order that a party to a contract consisting of mutually dependent covenants or obligations may maintain an action thereon, he must ordinarily place the other party in default by performance or a tender or offer of performance on his part unless such offer or tender is excused or waived, . . . Usually a formal unconditional tender is not necessary where the stipulations of the parties are to be performed concurrently, but a party to such a contract who is ready, able and willing to perform at the proper time, and so notifies the other party, has done all that he is required to do until the other party is also ready and willing to perform."

This statement is hornbook law and it applies whether the action is one under the contract or an action for recission. While a literal reading of the language of the document imposes an absolute obligation on the appellees to pay the Eleven Thousand Dollars ($11,000.00) on June 15 under any view of the transaction, payment of that balance and the delivery of the abstract showing marketable title within the agreement of the parties were to be performed concurrently. Neither on the 15th nor on the 18th of June, not at any other time were the appellees ready, able and willing to perform their part of the contract, nor did they at any time give notice to the appellants that they were ready, willing and able to perform upon the performance by the appellants of their obligation.

The Courts have gone a long way to excuse actual tender. An example of that liberality is found in the case of *Sherwin v. Baxter, (Kan.) 121 Pac. 1128.* The case seems to be all fours on the one now before the Court. There no abstract at all was furnished and the suit was to recover back the earnest money. No tender was made, but the purchaser offered to perform when the abstract was furnished. The payment was to be made on January 1. The salient facts are pointed out by the Court as follows:

> "On January 1, the appellant (purchaser) again asked the agent for the abstract and was told that he did not have it. On that day, and on January 2, the appellant (purchaser) was ready, willing and able to complete the contract on his part. He had the Eight Hundred Dollars to be paid, part of it in his pocket, a money order for a part, and a part in the bank. He said to the agent that he had the money and was ready to carry out his part of the contract, but made no formal tender of the cash, or of a note and mortgage executed by himself and wife . . ."

In disposing of an argument that a formal tender had to be made, the Court, after citing a number of cases, said:

> "In this case, the appellant (purchaser) was not bound to part with his money until the abstract was at least presented for his examination, which was never done. An offer to perform, made in good faith by a party ready and able to do so, is all that ought to be required in such a situation, whether the action be for a specific performance or for recovery of money

> advanced. Having made such an offer in the circumstances stated, and requested an abstract for title according to the agreement, which was not presented then or afterwards, the appellee (sellers) were in default."

The conduct of the purchasers here falls far short of the minimum requirements as established in the Sherwin case.

We believe there can be no question that the promises of the seller and buyer here are concurrent or dependent. The rule is to construe mutual promises as concurrent or dependent unless the intention that the promises be independent, is expressly stated.

The general rule is stated thus in *Stockstill v. Baird, 132 La. 404, 61 Southern 446,* as follows:

> "The courts at the present day incline strongly against the construction of promises as independent; and, in the absence of clear language to the contrary, promises which form the consideration for each other will be held to be concurrent or dependent, and not independent, so that a failure of one party to perform will discharge the other, and so that one cannot maintain an action against the other without showing the performance or tender of performance on his part."

Under this contract, the obligation of the purchaser to tender or to offer to perform was June 15. The sellers had at least until that time in which to furnish the abstract showing marketable title, and in view of the conduct of

the buyers in failing to demand the abstract earlier, certainly the obligation did not exist on the part of the sellers to furnish the abstract and to show marketable title before that date.

In *55 Am. Jur. Pru. 975,* the applicable rule is stated:

> "As a general rule, a party who asks for the rescission must himself be without fault, and when the payment of the purchase money and the making or tender of the deed are to occur simultaneously, they are regarded as mutual and concurrent acts disabling either party from putting an end to the contract without performance or a valid offer to perform on his part, and so far as the question of time is concerned, both parties, after the day provided for the consummation may be considered equally in default, and neither can hold himself discharged from the obligation of complete performance until he has tendered performance on his own side and demanded it on the other."

Under Section 7 of the Receipt and Agreement, time is made the essence of the agreement. There is much ambiguity in the contract, but the provision for the payment of the balance to the sellers on June 15, 1953, is clear and explicit. In *8 Thompson on Real Property 493, the author* says, in considering contracts to buy and sell real property:

> "A provision that time shall be of the essence of a contract to sell land is for the benefit of the vendor."

In *3 American Law of Property, 148,* in discussing contracts of the type before the Court, the author says:

> "Where time is of the essence of the contract, the tender in demand must be made on the day named."

The day named here was June 15. This rule applied literally, would have terminated the contract so far as the appellees are concerned on that date. Here we have a case where the appellees not only failed to make tender or any offer to perform on the day named, but have never made such a tender or offer to perform upon compliance by the sellers with their agreement.

In discussing the right of the buyer to recover earnest money or down payment, it is said in *8 Thompson on Real Property 605:*

> "Refusal or inability to perform the contract by the vendor will entitle a purchaser *who is not himself in default* to disaffirm the contract and recover the purchase price paid." (Emphasis ours).

Further, the author says at page 609:

> "In order to sustain the action, the purchaser need only show that *he is ready, willing and able to perform* his part of the contract." (Emphasis ours).

While the contract is unclear as to the time in which the abstract is to be presented, there is no doubt but the buyers agreed to be in a position to perform on June 15, 1953. They have not alleged they were in such a position. All the appellants knew, until the date of the hearing of

this case before the Court, when Mrs. Clermont said that on June 15 they would have been able to have made the payment by borrowing from a friend was that the appellees were unable to perform their part of the agreement, and under all the cases, the right of the appellees to here recover depends upon their own willingness and ability to perform on the performance date, June 15, 1953. We believe that what is said in *3 American Law of Property 116* exactly covers the situation here involved:

> "Performance by one party or a tender of performance is a prerequisite to his demand for performance by the other. The only time when his own performance is not a condition precedent to compelling the other party to perform is when it is excused by a refusal of the other party to carry out his obligation. The rule that the obligations are dependent covenants applies, of course, not only to formal sales contract, but also to options which by acceptance have become contracts. Where the promises call for a concurrent act of performance, neither is in default; the contract remains in force but inactive, and either party is in position to perform or tender performance and demand fulfillment of the obligations of the other at any time before they are barred by the statute of limitations."

See, also, *Townsend v. Tufts, (Cal.) 30 Pac. 528.*

There are cases without number on this general proposition of the requirement of a tender or an offer to perform, but this brief will not be burdened with further citations.

We respectfully urge that whether the action is considered one in the nature of rescission or one under the contract the mutual obligations of the parties is still subsisting and will continue to subsist until the appellees make an offer to perform and the appellants fail to perform or until the appellants perform, which we believe they have, and the appellees fail to perform.

This is true not only because the vast weight of authority, but because as a practical matter, there would be no logic in requiring the appellants to cure a defect if it did exist unless they have some assurance that the appellees would perform when the defects were cured. In this case, as we will point out later, if there is a defect in this title that makes it unmarketable, it is the lien of the irrigation charges. A witness on the stand testified that the amount of that lien was approximately Forty Dollars ($40.00) an acre (Tr. 48). As the abstract will show, the indebtedness is one held by the United States Government under the Reclamation Act, and the construction charge carries no interest. Appellant, Glenn Woodbury, testified that he could raise the money to discharge that lien if it was a defect within the agreement of the parties without being certain that the appellees would perform after the defect was removed, but he would lose the advantage of not having to pay interest if he did so and he wouldn't do it. That is the reason, of course, that he stated to counsel for appellees when he presented the abstract that he wasn't

going to do anything until he knew that the appellees were ready, willing and able to perform. He never received that assurance and has not received it to this date. The same thing is true of the contract for deed with Jannsen. That contract for deed as shown by the Receipt and Agreement and by the testimony of the parties, bears interest at the rate of three per cent (3%). Woodbury could raise the money to pay the obligation, but in doing so, he would lose the advantage of a three percent (3%) rate. Without the requirement of the law that the purchasers tender or offer to perform, the appellants would lose the advantage of this favorable contract as a pure gamble that the appellees would go through with their deal.

Appellees' brief cites cases which we believe do not support their contention as to tender or offer to perform. In the case of *State ex rel. E. C. Clark and Evan Owens v. District Court of the Tenth Judicial District, 11 State Reporter 559,* some of the language of the contract is the same as in the present case, but there is one vital difference which makes the case inapplicable to the one before the Court. In this case, the purchasers agreed to make a payment on June 15. They had an absolute obligation to make the payment on that date or to offer to perform on condition that the sellers perform. In the case cited by counsel the language reads:

> "The $15,000.00 earnest money held in escrow to be turned to R. B. Fraser *as soon as he shows good title to the land.*" (Emphasis ours).

Showing of good title was clearly a condition precedent in that case, and the obligation of the buyer might or might not arise. Further in the case, the statutes on attachment were being considered. The obligation under those statutes must be unconditional. We do not argue that the purchasers were unconditionally required to pay the Eleven Thousand Dollars ($11,000.00) on June 15, although the language of the contract might be construed to reach that result, but we do say that they had an obligation on that date to offer to perform on condition that the appellants performed.

In the case of *Bozdech v. Montana Ranches Company, 67 Mont. 366,* cited by counsel, the Court recites at page 374:

> "Full performance on the part of the appellees (purchasers) including tender of the final payment according to the terms of the contract, is likewise pleaded."

Further, the Court recites:

> "The appellees (purchasers) aver that they have at all times been ready, able and willing to duly do, keep and perform all things by them to be done, kept and performed under the terms of the said contract and agreement, etc."

The Court found that the evidence supported this pleading. The argument was over whether or not the tender of performance had to be unconditional. The case is clearly one that comes within the exception to the requirement of offer to perform or tender where the vendor has made it impossible for himself to perform, and the tender or offer to perform would be an idle act, and that is the holding of the Court. The holding does not fit the facts before this Court.

The principal case relied upon by the Montana Court in the Bozdech case, is *Sutthoff v. Maruca, 57 Wash. 102, 106 Pac. 632.* In that case, the Court recognizes the general rule that tender or offer to perform must be made. The Court held that tender was not necessary on the date fixed for performance solely on the grounds that the purchasers had:

". . . elected to and did rescind."

The Court then discusses a number of cases, all of them to the same effect, that where the vendor is obligated to convey on a day certain, if the purchaser chooses to rescind, no tender on his part is necessary, but the cases are specfically limited to those where the purchaser has by notice elected to rescind. Here, under counsel's theory, the purchasers have not elected to rescind, but are suing, as counsel puts it, to enforce the provisions of the living contract.

The Bozdech case is one for rescission, and there was an election to rescind.

In the case of *Silvast v. Asplund, 93 Mont. 584, the* vendor, without tendering performance on his part, sought to declare a forfeiture of payments made by the vendee, and the Court held, as we here contend, that one party to the contract may not, without performing or tendering to performance himself, declare the contract rescinded by reason of the failure of the other party to perform.

We urge that the decision in *Thorpe v. Rutherford, 150 Ore. 43 Pac. (2d) 907,* has exact application, and we take the liberty of quoting again from that decision:

> "A vendee who has not performed or tendered for performance on his part, cannot rescind and recover back what he has paid because of the vendor's failure to furnish an abstract showing marketable title."

E. Earnest money receipt should be reformed to change Jannsen arrangement from mortgage to contract for deed.

Parol evidence is admissible under the terms of *Subsection 1 of Section 93-401-13, Revised Codes of Montana, 1947.* Under that subsection, parol evidence is admissible:

> "Where a mistake or imperfection of the writing is put in issue by the pleadings."

Appellants have here pleaded mistake. See, also, *Read v. Lewis and Clark County, 55 Mont. 412, 418, 178 Pac. 177;*

Dobson v. Pearce, 12 N.Y. 156, 62 American Decisions, 152; Parrish v. Rosebud Mining Company, 140 Cal. 635, 71 Pac. 694, (Affirmed) 74 Pac. 312. By the answer and cross-complaint, appellants specifically alleged that the designation of the Jannsen obligation as a mortgage was a mistake and the testimony of Mrs. Clermont, wherein she specifically stated that it was her understanding that after the balance had been paid by the Clermonts to Woodbury, the legal title would be in Jannsen, proves the allegation.

This ambiguity could be cleared up by parol evidence and the proper modification in the earnest money receipt ordered by the Court. The authorities here are too numerous to discuss in detail, but in the case of *Butler Bros. Development Company v. Butler, 111 Mont. 329, 347, 109 Pac. (2d) 1051*, it is stated:

> "Appellant argues that when a contract is ambiguous, parol evidence of the circumstances leading up to its execution is admissible to explain its purpose. There can be no doubt concerning the correctness of this abstract principal of law."

F. The facts do not make this a proper case for relief from forfeiture.

The facts here do not show that the appellees are entitled to relief from their forfeiture. Their forfeiture was wilful. The appellants were at all times ready to go through with the contract even down to the time of trial. Appellees seek to evade the contract purely by claiming

that the written agreement mentions the word "mortgage," and it turned out to be a contract for deed, and they are unwilling to go forward with the transaction. Although the contract is eminently fair on its face, and although there is an abundance of evidence that they knew it was a contract for deed, and the earnest money receipt itself shows that they were willing to take an assignment of contract for deed according to its language in another paragraph, still appellees insist that they wanted and expected to buy the property subject to a mortgage and not a contract for deed. The value of property has gone down according to the uncontradicted testimony and the appellants have suffered damages by reason of this.

Further, this is not a proper case because it does not have the earmarks of a situation where the sellers are immediately able to resell the property for as much or more than they sold it for to the persons seeking to evade the rule against forfeiture.

In the case of *Donald v. Arnold (Mont.) 138 Pac. 775*, at page 776, it is held:

> ". . . that the rule against forfeitures, so far as this state is concerned, is expressed in Section 6039 of our Codes, and a party seeking its benefit must by his pleading and proof bring himself within it. It is not enough to say on appeal that a loss in the nature of a forfeiture may be incurred by enforcing the terms of a contract which the parties themselves have made; but, to secure the protection of Section 6039, it must be

> invoked, and 'the very minimum requirement is that the party invoking the protection afforded by that section must set forth facts which will appeal to the conscience of a court of equity'. Fratt v. Daniels-Jones Co., 47 Mont. 487, 133 Pac. 700. A concrete application of these rules illustrating some circumstanc authorizing relief from a loss in the nature of a forfeiture is furnished by the case of Cook-Reynolds Co. v. Chipman, 47 Mont. 289, 133 Pac. 694. The effect of all these cases is that relief from forfeiture cannot be awarded to one who fails to show that his breach of duty was not grossly negligent, *wilful,* or fraudulent." (Emphasis ours).

The appellants have not by their pleadings sought to declare a forfeiture. What they wanted was for the buyers to go through with the agreement. By their second count, the buyers are seeking relief from a forfeiture before it is declared. This they may not do.

Appellees, in their lower court brief, urged that if the Court found for the appellants and cross-complainants on the first count stated in the complaint, and if the appellees were not entitled to recovery of the earnest money and down payment under that count, then they should be relieved from the forfeiture under the provisions of Section 17-102, Revised Codes of Montana, 1947, which for the convenience of the Court, is here set out again:

> "Whenever, by the terms of an obligation of a party thereto incurs a forfeiture or a loss in the nature of a forfeiture by reason of his failure to comply with its provisions, he may be relieved therefrom upon

making full compensation to the other party except in the case of grossly, negligent, wilful, fraudulent breach of duty."

Appellants alleged in their answer and cross-complaint that the appellees were in their conduct in this case, grossly negligent, wilful and guilty of a fraudulent breach of duty. We have alleged that they did not act in good faith. We believe the record justifies our position and as we have set out earlier in this brief by the testimony of Mrs. Clermont, their objection to the status of the Jannsen obligation was not made in good faith. As to the second objection to the title relied upon, the lien of the construction charges for the irrigation district, they had the power to discharge the obligation out of the payment to be made to Woodbury. They assumed the payment of the water charges. Their actions in making the two objections were not based on any genuine concern as to the sufficiency of the title.

Their only purpose in making the objections was to get out of their obligations under the agreement to buy the property. Their actions come within the provisions of the exception contained in the statute.

In the case of *Cook Reynolds Co. v. Chipman, 47 Mont. 289, 133 Pac. 694*, the Court held that if there were no gross negligence or wilful or fraudulent breach of duty under this statute, the buyer would be entitled to a return of his payment:

"In excess of respondent's (sellers) damage."

The testimony that the property involved had declined in value more than the amount of the down payment is uncontroverted.

If the conduct of the Clermonts brings them within the Cook Reynolds case, they still could get no part of the down payment back since the damage to the seller exceeds the amount of the down payment.

The amount of recovery where it is determined that the buyer is entitled to relief from forfeiture is stated in *Fontaine v. Lyng, 61 Mont. 590, 599, 202 Pac. 1112:*

> "If, then, the actual damages sustained by defendants, are less in amount than the money paid by the plaintiff upon his contract, plaintiff is entitled to reimbursement to the extent of the excess payments."

Accepting then the argument of the appellees that they are entitled to relief from forfeiture, there could still be no recovery because the uncontroverted testimony is that the value of the land has decreased more than the amount of the down payment.

IV. CONCLUSION

Not much time has been devoted in this brief to the question of whether the Court properly ordered Mr. Woodbury rather than the real estate agent Hagarty, who is not a party to this action, to pay the $1,000.00 which made up a portion of the $5,000.00 down payment. But since Mr. Clermont undertook to make payment directly to the real

estate man it is submitted in this conclusion that Mr. Clermont should seek his return of this money from the man to whom he voluntarily paid it over rather than from Mr. Woodbury if indeed the appellees have any right at all to have this $1,000.00 returned to them.

It is respectfully submitted that the complaint of the appellees should be dismissed and judgment entered for the appellants because:

(1) There was neither allegation of a tender or performance or of an offer to perform by the appellees;

(2) The records show that there was no tender or offer to perform either made or communicated to the appellants;

(3) By the terms of the agreement between the parties, conveyance was to be made by contract for deed. By the agreement, the appellees assumed the obligations of the contract between the appellees and Bernhard Jannsen, and knew and fully understood the essential nature of the obligations they assumed;

(4) The appellees were advised of the amount of the water charges and were advised that the information concerning those charges was available in the public record, and from their conduct and their knowledge and their opportunities to secure full knowledge, they waived any right to object to the lien of the construction charges;

(5) If the appellees did not waive a right to object to the lien of the construction charges for the irrigation project by the terms of the contract they could have required that the lien be discharged out of the moneys owing to the sellers under the contract;

(6) The damages to the appellants were greater than the amount of the down payment and there could, therefore, be no relief from a forfeiture of the down payment even if there had been pleadings seeking to declare a forfeiture;

(7) The appellees have no good-faith concern over the title to this property and are only concerned in trying to get out of this deal because they have regretted their bargain.

We respectfully submit that for the foregoing reasons the judgment should be reversed.

Respectfully submitted,

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